No. 85-656

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1985

SECRETARY OF STATE OF THE STATE OF WASHINGTON, RALPH MUNRO,

Appellant,

v.

SOCIALIST WORKERS PARTY, ET AL.,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF APPELLEES

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QUESTIONS PRESENTED

1. Whether the evidence supports the Court of Appeals' finding that Washington's political history evidences no voter confusion, ballot overcrowding, or other impairment of the integrity of the electoral process resulting from minor party participation, under the preexisting reasonable ballot access limitations.

2. Whether the new stricter restrictions on ballot access, which have "substantially barred minor party candidates for statewide offices from the ballot" since their enactment, impact fundamental First and Fourteenth Amendment rights to vote and associate for the advancement of political ideas.

3. When the State of Washington had an effectively functioning nominating signature requirement for ballot access in place for many decades, did the Court of Appeals correctly hold that the imposition of new stricter restrictions, that kept almost all minor parties off the statewide general election ballot, must be justified by evidence of some real and substantial harm or danger requiring the new restrictions.

4. Whether the Court of Appeals correctly held that, on the record before it, the state had failed to present evidence to establish any substantial threat of harm requiring the imposition of the new uniquely restrictive scheme which, as applied, effectively barred minor parties from the general election ballot in statewide elections, such as this one for U.S. Senate.

5. Whether the effect of Washington's ballot access limitations, as applied in this case--to reduce the number of parties on the ballot for U.S. Senator from three to two--was more restrictive than necessary to protect the State's interest in preventing a cluttered ballot, voter confusion, and to protect the integrity of the election process from frivolous or fraudulent candidacies.

6. Whether *Anderson v. Celebrezze*'s prohibition of the discriminatory effect on minor party and independent candidates of a relatively early filing deadline applies to elections for the U.S. Senate as well as to Presidential elections.

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Constitution[1]

[1]The text of each provision is set forth in Appendix A. to this Brief.

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STATEMENT OF THE CASE

1. Nature Of The Case.

This is an action for declaratory and injunctive relief. Plaintiffs are a minor party, one of its candidates, and voters, who asked the court to declare unconstitutional, as applied, certain election laws of the State of Washington adopted in 1977, principally RCW 29.18.110[2] (*See* Appendix A.) These amendments, since their adoption, have in their effect substantially excluded minor parties from participating in general elections for state-wide offices in the State of Washington. The specific election at issue below has now passed. However, this case is not moot. *Moore v. Ogilvie*, 394 U.S. 814, 816 (1969).

2. Opinion Below.

The Court of Appeals, at 765 F. 2d 1417 (1985), found the challenged electoral scheme unconstitutional, as applied to statewide electoral contests.

3. Facts Relevant to the Issues Presented for Review.

(a) Plaintiffs

Plaintiff-Appellee Socoalist Workers Party (SWP) is a serious, legal, political party with a long history of social and political activism in the United States, including the State of Washington.

The SWP is clearly not a frivolous or fraudulent party.[3] The SWP has been a nationally organized, serious political party for over forty years. Its candidates have regularly participated in local and national elections in the majority of states in the union. This has required the collection of hundreds of thousands of nominating petition signatures, to obtain ballot placement in the various states. JA 54. Its candidates for national and local office have regularly part-

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[2]The 1977 Amendments to RCW 29.18.020, .110, 29.24.020 and 29.30.100 together move the qualification deadline ahead two months for minor parties, put their nominee on the primary rather than the general election ballot, and bar the nominee from the general election ballot unless 1% of the primary votes are cast for the minor party nominee.

icipated in elections in the State of Washington, and have regularly achieved ballot placement, by nominating petition signatures, prior to the 1977 amendments at issue here.[4] The party's campaigns are conducted by earnest and experienced political activists. They espouse a serious political program and address important issues pertaining to foreign policy, economics, social equality, and government. Affidavit of Hickler, JA 28, *ff.*

Plaintiff Dean Peoples was the lawfully nominated candidate of the Socialist Workers Party for the 1983 Special Senatorial Election. He was nominated by the convention held in September, 1983, in compliance with the procedure established by R.C.W. 29.24, and his nomination was duly certified by the Secretary of State. Because of the 1977 amendments, his name was placed on the primary ballot instead of the general election ballot.[5] Thus instead of increasing the choices in the general election from two to three, The SWP's nominee was thrown in with the eighteen Democrats and fourteen Republicans whose

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[3]The legislative history of the 1977 amendments, though sparse, does contain a definition of a "frivolous minor party" for the purpose of this legislation:

> Mr. Deccio: Representative Nelson, you use the term "frivolous minor parties". Would you give us an example of what a frivolous minor party is?
>
> Mr. Nelson (Dick): Well, I think, to give you a general definition, I think a frivolous minor party is a party that really doesn't have a platform and isn't seriously proposing solutions to the problems of the State and this nation.

1977 House Journal, Vol I, p. 696.

[4]In the 1976 General Election for U.S. Senate, the SWP candidate received over 7,400 votes. J.A. 137. Since then, under the restrictions imposed by the new legislation restricting it to the primary, the SWP vote count has plummeted. JA 79.

[5]Compare [new] RCW 29.18.020 with former 29.30.100. Appendix A.

names were placed on the primary ballot to contend for their parties' nominations, who were on the same ballot simply as a result of their individual declarations of candidacy.[6]

(b) The Election.

The 1983 race for the Republican nomination for U.S. Senate was hotly contested between Dan Evans and Lloyd Cooney. Likewise, the race for the Democratic nomination was hotly contested between Mike Lowry and Charles Royer. As a result, these top four candidates together got approximately 98% of the vote in the primary election, the other two percent being divided among the remaining twenty-nine candidates. None of these other candidates, including Plaintiff Dean Peoples, got anywhere near 1% of the primary votes. JA 136. The primary contest for the party nominations thus resulted in Dan Evans being selected as the Republican candidate, Mike Lowry being selected as the Democratic candidate, and Dean Peoples, the candidate already lawfully selected by the nominating convention as the candidate of the Socialist Workers Party, being barred from the general election ballot because of his failure to poll the approximately 7,000 primary votes he would have needed to meet the new requirements of RCW 29.18.110. The effect of this new restriction was simply that the general election ballot thus carried the names of the nominees of two parties rather than three. Voters were given no alternative to the Democratic and Republican parties, as a direct result of the statute under challenge in this case, even though over 36 percent of the voters in the primary had voted against the two nominees who reached the general election ballot, and over half the registered voters had not even participated in the primary. Affidavit of Whiting. JA. 80.

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[6]RCW 29.18.030.

(c) History of the Statute Under Challenge.

Prior Law.

Prior to Chapter 209, Laws of 1907, which provided for primaries, all candidates for election in the general elections in the State of Washington were nominated by party conventions. Opinions of the Washington Attorney General 1935-1936, p. 40. The new 1907 primary election laws restricted participation in primary elections to political parties whose candidates received 10% of the votes cast at the preceding general election. Section 5183, 5203, Rem. Rev.Stat. New and minor parties continued to nominate by convention. Starting in 1925, convention nominating petitions required the signatures of at least twenty-five registered voters. Laws of 1937, Ch. 97 § 2.

By the time of the 1977 amendments, minor party nominating conventions required the attendance of at least one hundred registered voters, whose signatures and addresses were required to be affixed to the nominating petition. RCW 29.24.030, .040. The 1977 amendments increased the number of signatures required for a valid nominating petition, to one-hundredth of one percent of the registered voters, now amounting to just under two hundred signatures. AB. 5. Appellees do not challenge the nominating signature requirement of the 1977 statute, since such requirements have always kept the number of candidates to a small number, while allowing ballot access to most minor party candidates who made a serious or reasonably diligent effort to qualify.

From its inception, the State of Washington successfully held elections pursuant to this scheme. Minor parties regularly participated in statewide elections. *See* Appendix A, to the Complaint, JA 25. The record indicates that in only one year, 1952, was there no minor party candidate for Governor, historically the race with the most minor party participation. In the other twenty elections the number of minor party candidates varied between a minimum of one and a maximum of six. The mathematical average was 2.75

minor party candidates participating per election.[7] The number of nominees for other statewide offices has been substantially less than the number for Governor. For U.S. Senate, for example, there were 3 minor party nominees in 1976, four in 1974, and never more than two before (or since). There have never been more than four minor party candidates on the ballot for any other office covered by this law. J.S.:A-6. (The evidence is contrary to the Defendant's misleading statement at AB 8, without citation to the record, implying that 12 parties were competing for offices affected by this contested law.) The following table summarizes the recent history of minor party nominations for major statewide offices.

Table I

MINOR PARTY CANDIDATES

	U.S. Senate		
		Nominated	On Election Ballot
old law	1952	2	2
	1956	0	0
	1958	0	0
	1962	2	2
	1964	0	0
	1968	2	2
	1970	2	2
	1974	4	4
	1976	3	3
new law	1980	2	0
	1982	1	0
	1983	1	0

[7]And, as noted by the Court of Appeals, the number of candidates declined: in the first 10 elections of the century the average total number of candidates was 5.3; in the last 10 elections, only 4.2. J.S.:A-6

Table I Continued

		State Governor	
old law	1952	0	0
	1956	1	1
	1960	2	2
	1964	1	1
	1968	2	2
	1972	3	3
	1976	6	6
new law	1980	1	0
	1984	2	0

Notes: For each other statewide office (Lieutenant Governor; Secretary of State; Attorney General; State Auditor; State Treasurer; Land Commissioner; Insurance Commissioner), there have been substantially fewer minor party candidates, usually none, occasionally one, rarely two, with only one exception: Lt. Gov. had 4 minor party nominees in 1976. In total 15 of 15 qualified for 49 races 1952-1976. Only one qualified for the 14 races in 1980 and 1984. State of Washington, Abstract of votes.

Cf. Williams v. Rhodes, 393 U.S. 23, 47 (1968) (Harlan, J., concurring) ("[T]he presence of eight candidates cannot be said, in light of experience, to carry a significant danger of voter confusion.")

There is no evidence that in this entire history of elections under pre-existing law, there was ever a problem with a "cluttered ballot," "voter confusion," or any impairment of the "integrity of the election process," by "frivolous or fraudulent candidacies."

New Restrictions.

In 1977, the Washington legislature revised the election procedures for minor parties, with the purpose and effect of adding a substantial new barrier to minor party ballot access.

Previously, the partisan primary[8] had been conducted only to select major party nominees for the ballot, as an alternative to the previous convention method of nominating candidates for the election ballot. The 1977 legislature repealed RCW 29.30.100, which put minor party convention nominees directly on the general election ballot, the same as major party primary nominees. The amendment to RCW 29.24.020 moved the time for minor party candidate selection from September up to July: from the time of the major party primary up to a date before the major party prospective nominees have even begun to declare their candidacies.

The 1977 amendments also required the name of the single nominee of the minor party to be placed on the primary ballot, along with the names of all the multiple aspirants for the nomination of each of the two major parties, whose names appear on the ballot as a result of their simple declaration of candidacy. RCW 29.18.030. RCW 29.18.110 *See* Appendix A.

The following chart illustrates the changes in timing which now impose a relatively early deadline on the minor parties, compared to the previous scheme which made the major and minor party nomination dates simultaneous.

[8]"The purpose of a primary election is to narrow the field of candidates to one per party in order that the general election might be reserved for major struggles, not intra-party feuds." *Cross v. Fong Eu*, 430 F.Supp. 1036, 1038 n.2 (N.D.Calif. 1977), citing *Storer v. Brown*, 415 U.S. 724, 735, (1974).

TABLE II
TIME LINE

	Prior Law		New Law	
	Major Party	Minor Party	Major Party	Minor Party
July	Candidates Declare for Nomination: week starting last Monday in July.		Same as prior law	Nominee Selected & qualified by convention--petition'; Saturday prior to major party primary filings; nominee placed on primary ballot instead of general election
Aug.				
Sept.	Selection of Nominee: Primary Election on 3d Tuesday	Minor Party Convention to Select Nominee; petition signature requirement for ballot placement	Same as prior law	Minor Party Nominee disqualified if primary votes under 1%.
Oct.				
Nov.	Nominees run in election: 1st Tues. in November.	Nominee runs v. other nominees.	Same	

Voters now must choose between participation in the major party primary candidate selection process, or instead casting their primary election vote for the single minor party nominee who has already been selected at the nominating convention. Unless the minor party candidate receives votes of more than one percent of the total number of votes cast in the primary, the minor party is excluded from the November general election ballot. No explanation of this requirement appears on the primary ballot. While there is nothing inherently impossible about the one percent primary vote requirement, it is the actual effect of this barrier that must be examined. And, in practice, the barrier has proved nearly insurmountable.

(d) Effect of Statute on Minor Parties.

In each election held during the almost seven year period since the law was amended, at least one, but not more than several, minor party candidates have attempted to win a position on the general election ballot. The 1977 amendments, as applied, resulted in the total exclusion of all minor party nominees[9] from participation in the general election process for statewide offices from the time the amendments were adopted, until the time this suit was filed. The state supplemented the record on the day of oral argument before the Ninth Circuit, indicating that of the four subsequent candidates, one--the Libertarian nominee for State Treasurer--had gotten just over the 1% barrier. The Circuit Court did not find this one exception, in a relatively low interest race, to be sufficient to establish the general reasonableness of the barrier.[10] J.S.:A-4

[9]Three "independent" candidates, well known political figures who apparently felt they were unlikely to get the Republican or Democratic nominations, have qualified for the ballot under the new scheme. Their ability to meet the 1% requirement does not indicate that the barriers are reasonable as applied to minor parties. *See* Argument below. (One, John Miller, was previously president of the Seattle City Council and is now a Republican member of the United States Congress. Jesse Chiang was a previous contender for the Republican Party nomination. King Lysen was a prominent Democratic Party member of the State Legislature.) See J.A. 135, 136.

[10]There is no evidence shows that all the excluded nominees were less diligent than the nominee for treasurer. And total exclusion is not required to show a substantial impact on protected interests. *See, e.g. SWP v. Secretary*, 412 Mich. 571, 317 N.W.2d 1, 9 (1982) (3 out of 4 minor parties qualified in 1980, none of 3 in 1978). *Anderson, infra* at n.12 (5 minor parties qualified).

Washington law also apparently excludes persons who have participated in the primary election, as minor party candidates are now required to do, from having even write-in votes counted in the general election. R.C.W. 29.51.170[11]

Had minor party nominees not been excluded in this way in the eight years *since* the new restrictions, there still would have been no race with more than two minor party candidates on the general election ballot.

However, as a result of the new restrictions, voters at the general election whose political preferences lie outside the existing political parties have been deprived of a minor party alternative to the major party candidates for statewide office.

SUMMARY OF ARGUMENT

The discriminatory purpose and invidious effect of the additional restrictions imposed upon minor party access to the ballot in 1977 was to remove the minor parties from the central arena of political debate--the general elections--and restrict them to the pre-election candidate selection process--the primary elections--in which numerous major party candidates are competing to become the nominee of their party.

If the State of Washington had just retained its straightforward nominating petition signature requirements for minor party ballot access, like other states have, this case would not be here.

The State of Washington has been conducting elections with minor party participation under its old nominating

[11]"*Provided*, That no write-in vote for a partisan office at a general election shall be valid for any person who has offered himself as a candidate for such position for the nomination at the preceding primary." *And see* Affidavit of Donald Whiting, Supervisor of Elections, at pp.2-3, JA 135, indicating no write-in votes recorded in list of election results, which is limited to candidates on the ballot. The assertions of counsel for Appellant of an interpretation of the statute which would relieve minor party candidates of its exclusionary effect is not supported by any evidence. (Even if it were, this would not save an otherwise unconstitutional ballot access restriction. *See* Argument, below, *Anderson*, 460 U.S. at 799 n.26.)

signature requirements since the turn of the century with no evidence of ballot crowding, voter confusion, or impairment of the integrity of the election process.

On the contrary, minor parties play a vital role in our electoral process--as a fertile source of new ideas, as a source of diversity and challenge to the status quo--and they have significantly influenced the major parties on issues from abolition to civil rights, from women's suffrage to the Vietnam war. The legitimacy and stability of our political system is enhanced when the electoral forum is open and not monopolozied by the two major parties. Though our winner-take-all electoral system makes large vote totals for minor parties very unlikely, the essential role[12] of minor party participation in the electoral process has been universally acknowledged. *Anderson v. Celebrezze*, 460 U.S. 780, 786 (1983); *Illinois State Board of Elections v. Socialist Workers Party*, 440 U.S. 173, 188 (1979).

Now the State of Washington has effectively terminated minor party participation in the races most significant to the press and the populace: the statewide races such as U.S. Senator and State Governor. The new 1977 ballot access restrictions inappropriately handicap the minor parties with requirements that have proved virtually impossible to meet, as applied in practice. The SWP nominee Plaintiff Dean Peoples was unable to get on the ballot in this case. As far as the record reflects, no minor party senatorial candidate has *ever* been able to meet these requirements. And there is no evidence that the preexisting nominating convention petition signature requirements have not adequately limited minor party participation: to an average of about two minor party nominees per race--with a historical maximum of 4, in the U.S. Senate elections.

The new election law has effectively barred these minor party nominees from the ballot by relegating them to the

[12]In fact, allegations of restrictions on minor party ballot access in Nicaragua have been asserted as demonstrating the end of democracy in that country.

primary election. The September primary is not, strictly speaking, an election, because in it *no one can be elected.* It is merely a nominating process. Even if only one candidate should declare for the office, and thus get 100% of the primary votes cast in September, the result is not *election*, but rather simply earning one party's *nomination* for the race on the election ballot in November. In other words:

> The purpose of a primary election is to narrow the field of candidates to one per party in order that the general election might be reserved for major struggles, not intra-party feuds.

Cross v. Fong Eu, *Supra*, n.8.

As a result, it is only natural that the primary election attracts a relatively small number of voters--primarily the major party adherents who are most concerned about who the party nominees will be. Even though the "blanket" primary is designed to attract broader participation in the primary, experience suggests that "cross-over" voting is minimal, *Heavey v. Chapman*, 93 Wn. 2d. 700, 611 P.2d 1256, 1259 (1980) (Horowitz, J., concurring), and in Washington only about 38% of the registered voters participate in the primary, on average. JA 80.

Thus, minor party "campaigning" is relegated to the relatively early period before major party nominees are selected, a time when "volunteers are more difficult to recruit and retain, media publicity and campaign contributions are more difficult to secure, and voters are less interested in the campaign." *Anderson*, 460 U.S. at 792.

Major party candidates can get on the primary ballot simply by declaring, rather than having to meet the same convention requirements imposed on minor parties. As a result the primary ballot *is* crowded: 33 contending Democrats and Republicans in the primary in our case. This delays the possibility of any effective debate on the major issues until after the field of candidates has been limited to one per party. Candidates forums, community

meetings, and the like would be impossible until after the primary with such a crowd of candidates.[13]

Once the primary was over, and voters dissatisfied with the choices within the two major parties might have been attracted by the campaign of a minor party alternative, it was too late. The field had been narrowed from three candidates to two, and the election campaign itself was limited to Democrats versus Republicans. The two major parties were by then deprived of any motivation to consider the ideas of the third party candidate, to try to forge a broader coalition to win away minor party supporters.

All voters whose political preferences were outside the two major parties were left with the choice of voting for a candidate who was not responsive to their views, or to sit out the general election.

If the state is to justify a system which, in practice, has limited the significant campaign to the points of view of the two major parties, it must sustain the burden of proving some *need* to adopt such restrictive measures, beyond the theoretical permissibility of ballot access requirements in general. Against Washington's historical pattern of successful openness, the "draconian"[14] new changes require substantial evidence of some real and substantial problem to justify their imposition.

After carefully weighing the interests the state advanced, and correctly applying the tests acticulated by this Court in the leading cases, the Court of Appeals below correctly found that the state had failed to make any record that would fulfill its obligation to justify the new restrictions, and held they were invalid as applied to the plantiffs minor party, candidate, and interested voters, and others similarly situated.

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[13]It is revealing that while the State argues that the primary ballot appearance of minor party candidates is an adequate substitute for general election ballot access, AB 18, the benefits of a ballot of reasonable size, limited to serious candidates, are not extended to the minor parties in the primary process they are supposed to be satisfied with as their one chance to address the electorate.

[14]Characterization by the Court of Appeals, J.S. A-7.

Petition signature requirements have been upheld in the past as a legitimate *means*[15] to accomplish the important state goal of avoiding the confusion and expense of a ballot flooded with frivolous candidates. The State of Washington has such a signature requirement and the SWP complied with it. They were the only minor party to do so. The State has never contended that the Peoples candidacy was frivolous. Yet the new restrictions eliminated Peoples, the only alternative to the major parties, from the general election ballot. The issue remains whether the *addition* of the new restrictions to the continuing signature requirement was *necessary*.

The Appellant Secretary's Brief admits, as it must, the factual basis for our case: minor party nominees have been kept off the statewide general election ballot by the new restrictions. Its response is to argue that:

--Write-in votes are sufficient: this is legally and factually wrong. Write-in votes are not allowed and even if they were this would not be a constitutionally adequate substitute for ballot access. *Anderson*, 416 U.S. at 799 n.16.

--Higher percentages have been upheld in other cases. This Court has upheld a higher *petition* requirement. But there is no reason to believe that a 1% *vote* requirement is not much harder to achieve, as has been established by the record in this case, as compared to the record in other cases showing substantial and regular access to the ballot by minor parties, by petition alone.

--Access to the primary process means that elimination from the general election does not heavily burden minor party interests. This is without support in authority or in logic, due to the inherent limits on voter and media interest in the overcrowded primary process, and the very different purposes of the primary process compared to the general election.

[15]Such a requirement is not an end in itself. *Anderson*, 460 U.S. at 788 n. 19.

--Finally, even though the SWP and other similarly situated candidates for statewide office have been systematically excluded from the ballot, this fact can be obscured by a chart lumping local candidates together with statewide candidates. It is clear on the record, however, that the effect of the law is drastically different for the two categories. It is of no benefit to voters, or to candidates eliminated from the major, statewide races, that other candidates or parties may qualify for county commissioner, or other local office. Thus the only issue raised on the pleadings and decided by the courts below was the validity of the new restrictions as applied to this race for U.S. Senate, in view of the overall exclusionary effect on all minor party attempts to nominate candidates for the general election ballot for all statewide races.

As shown below, on the issue presented to it, the Court of Appeals was plainly right.

ARGUMENT

I. THE COURT OF APPEALS CORRECTLY IDENTIFIED AND APPLIED THE ANALYSIS ESTABLISHED BY THIS COURT.

A. Ballot Access Restrictions Impact Fundamental First Amendment Rights Of New And Small Political Parties, Their Members And Supporters, And Of Voters In General, To Vote And To Associate For The Advancement Of Political Beliefs.

This Court has summarized the constitutional rights implicated by ballot access restrictions as follows:

> Restrictions on access to the ballot burden two distinct and fundamental rights: "The right of individuals to associate for the advancement of political beliefs and the right of qualified voters, regardless of their political persuasion, to cast their votes effectively." *Williams v. Rhodes*, 393 U.S. 23, 30 (1968). The freedom to associate as a political party, a right we have recognized as fundamental ..., has diminished practical value if the party can be kept off the ballot. Access restrictions also implicate the right to vote because absent recourse to referendums, "voters can assert their preferences only through candidates or

parties or both." *Lubin v. Panish*, 415 U.S. 709, 716 (1974). By limiting the choices available to voters, the State impairs the voters' ability to express their political preferences. And for reasons too self-evident to warrant amplification here, we have often reiterated that voting is of the most fundamental significance under our constitutional structure. *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964); *Reynolds v. Sims*, 377 U.S. 533, 555 (1964); *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972).

When such vital individual rights are at stake, a state must establish that its classification is necessary to serve a compelling interest. *American Party of Texas v. White*, 415 U.S. 767, 780-81 (1974).

...[And] "even when pursuing a legitimate interest, a state may not choose means that unnecessarily restrict constitutionally protected liberty," *Kusper v. Pontikes*, 414 U.S. 51, 59 (1973), and we have required that states adopt the least drastic means to achieve their ends. *Lubin v. Panish*, *supra*, 415 U.S. at 716; *Williams v. Rhodes*, *supra*, 393 U.S. 31-33. This requirement is particularly important where restrictions on access to the ballot are involved.The states' interest in screening out frivolous candidates must be considered in light of the significant role that third parties have played in the political development of the Nation. Abolitionists, Progressives, and Populists have undeniably had influence, if not always electoral success. As the records of such parties demonstrate, an election campaign is a means of disseminating ideas as well as obtaining political office. *See* A. Bickel, *Reform and Continuity*, 79-80 (1971);W. Binkley, *American Political Parties*, 181-205 (1959); H. Penniman, *Seit's American Political Parties and Elections*, 223-239 (5th Ed. 1952). Overbroad restrictions on ballot access jeopardize this form of political expression.

Illinois State Board of Elections v. Socialist Workers Party, 440 U.S. 173, 184-186 (1979).

The Court of Appeals rendered its decision in this case based explicitly on the guiding principles summarized in the latest of the series of major cases analyzing the legitimacy of state restrictions on minor party ballot access, *Anderson v. Celebrezze*, 460 U.S. 780 (1983). There this Court rejected the idea of a "litmus-paper test" that would separate valid from invalid restrictions, and described the following analytical process, adopted by the court below:

> [A court] must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate. It then must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule. In passing judgment, the Court must not only determine the legitimacy and strength of each of those interests; it also must consider the extent to which those interests make it necessary to burden the plaintiff's rights. Only after weighing all these factors is the reviewing court in a position to decide whether the challenged provision is unconstitutional.

Decision of the Court of Appeals, JS A-2, 3.

B. "Minor Party" Participation In The Electoral Process Is Essential To The Health And Vitality Of The Marketplace Of Ideas And Our Republican Form Of Government.

As noted above, ballot access restrictions operate in an area of the most fundamental First Amendment activities. If the only purpose of the electoral process were the selection of an office holder for the prescribed period, then the elimination of minor party candidates from the ballot would do no harm, as they are unlikely to actually get elected. But such a conception would be totally mistaken, in light of the established principle that "an election campaign is a means of disseminating ideas as well as attaining political office." *Ill. State Bd. of Elections v. SWP*, *supra*, at 186.

Political association, political expression, and voting are integral to the operation of the republican system of government established by our Constitution. The First Amendment affords the broadest protection to such political activities in order "to assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Roth v. United States*, 354 U.S. 476, 484 (1957). Governmental "action which may have the effect of curtailing" such fundamental freedoms "is subject to the closest scrutiny." *NAACP v. Alabama*, 357 U.S. 449, 460-461 (1958).

> By limiting the opportunites of independent-minded voters to associate in the electoral arena to enhance their political effectiveness as a group, such restrictions threaten to reduce diversity and competition in the marketplace of ideas. Historically political figures outside the two

major parties have been fertile sources of new ideas and new programs; many of their challenges to the status quo have in time made their way into the political mainstream. *Illinois Elections Bd. v. Socialist Workers Party*, *supra*, 440 U.S., at 186; *Sweezy v. New Hampshire*, 354 U.S. 234, 250-251 (1957) (opinion of Warren, C.J.).[17] [[17]*See generally*, V.O. Key, *Politics Parties, and Pressure Groups* 278-303 (3d Ed. 1952). As Professor Bickel has observed,

> "Again and again, minor parties have led from a flank, while the major parties still followed opinion down the middle. In time, the middle has moved, and one of the major parties or both occupy the ground reconnoitered by the major party;....[A]s an outlet for frustration, often as a creative force and a sort of conscience, as an ideological governor to keep major parties from speeding off into an abyss of mindlessness, and even just as a technique for strengthening a group's bargaining position for the future, the minor party would have to be invented if it did not come into existence regularly enough."

A. Bickel, *supra* n. 11, at 79-80.]

In short, the primary values protected by the First Amendments--"a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open," *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)--are served when election campaigns are not monopolized by the existing parties.

Anderson v. Celebrezze, 460 U.S. at 794 (1983).

In a republican form of government, political power is excercised by minority groups not only by *electing* a candidate of the group, but also in participating in the political process in other ways, such as forming electoral coalitions to campaign for common goals, and affecting the platforms of other parties who seek to gain their collective support, or to win their voters away from them. The theory of representative government is that shifting coalitions will modify and redefine their positions so as to appeal to new constituents and maximize their political strength.[16]

[16]*See*, J.S. Mill, Considerations on Representative Government 146 (1st Ed. London 1861) ("It is an essential part of democracy that minorities should be adequately represented.") See also, Note, Section 5 of the Voting Rights Act, 94 Yale L.J. 139, 142 (1984).

If minor parties can be excluded from the general election ballot, the major parties are insulated from any possibility that the results may be affected by these organized groups of voters, and thus have no motive to aim their appeals, or act in office, in such a manner as to represent the interests of minor party voters.

When insular minorities are the target of exclusion from political participation, this decreases the stability and legitimacy of our political system.[17]

C. The New Ballot Access Requirements In The Present Case Directly And Substantially Impair The Fundamental Rights Identified By This Court, Making Appropriate Heightened Judicial Scrutiny.

1. The Rights At Stake Are Those Traditionally Strictly Protected.

The State's claim (AB at 17-19) that Washington's new ballot access restrictions do not impact the fundamental rights identified by this Court and outlined above is both factually and legally wrong. Rather, as is shown in detail in Arguments §§ II,III, and IV below, the new restrictions, as applied to statewide elections, have tremendous adverse impact on precisely the "full debate" and "prevention of monopoly" interests the State admits (AB at 16) are crucial to the analysis in this case. Given this substantial impact on these rights, the Court of Appeals' analysis and conclusion was clearly right under this Court's precedents.

The rights at stake in this case trigger all three of the tests for heightened judicial scrutiny catalogued in the now-famous footnote in *United States v. Carolene Products Company*, 304 U.S. 144, 152-153 n.4 (1938), cited in *Anderson* at 460 U.S. 793, n.16.

Discussing the exceptions to the mere "rationality" test based on a "presumption of constitutionality," the first paragraph of the footnote refers to the exception which

[17]*Compare:* Voting Rights Act of 1965, 42 U.S.C. §1971 et ff. The effect of the new restrictions on minor parties has been a classic "retrogression" of minority voting power, which should be countenanced for only the most compelling reasons.

arises in the event of a conflict with the fundamental rights embodied in the Constitution and the Bill of Rights, "which are deemed equally specific when held to be embraced within the Fourteenth." The second paragraph "suggests that it is an appropriate function of the Court to keep the machinery of democratic government running as it should, to make sure the channels of polical participation and communication are kept open." Ely, *Democracy and Distrust* at 76 (1980). And the third paragraph focuses on the review of statutes which reflect a "prejudice against discrete and insular minorities" "which tends to seriously curtail the operation of those political processes ordinarily to be relied upon...and which may call for a correspondingly more searching judicial inquiry." *Carolene, id.*

Though the text of the First Amendment does not explicitly mention freedom of association, it is now beyond argument that the First Amendment guarantees of speech, press, assembly, and petition require the recognition of a fundamental First Amendment freedom of association. In *NAACP v. Alabama, ex rel. Patterson*, 357 U.S. 449, 460 (1958), the Court explained:

> Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association....It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the "liberty" assured by the Due Process Clause of the Fourteenth Amendment which embraces freedom of speech....

The second concern discussed in *Carolene Products, supra*-free access to the political process--is also at the heart of the First Amendment. Associational activity in the political process falls within the core of the values protected.[18] Thus in *Williams v. Rhodes*, 393 U.S. 23 (1968), this Court invalidated ballot access burdens that impacted the right of political association by keeping minor parties off the ballot, thereby frustrating the effectiveness of their association. *Id.* at 30-31. In *Kusper v. Pontikes*, 414 U.S. 51 (1973), the Court reiterated that "there can no longer be any doubt that freedom to associate with others for the common

[18]*See*, e.g. *Brown v. Hartlage*, 456 U.S. 45, 53 (1982), and cases there cited.

advancement of political beliefs and ideas is a form of 'orderly group activity' protected by the First and Fourteenth Amendments."

The Constitution does not protect these rights only against total denial, but also from any "significant interference." *Bates v. Little Rock*, 361 U.S. 516, 523 (1960). "Freedoms such as these are protected not only against heavy handed frontal attack, but also from being stifled by more subtle governmental interference." id. at 523. Thus, contrary to the State's assertion (AB 15) that only a "virtual bar" of minor party access can be seen as having any impact on the rights at stake, any substantial burden on these rights is carefully scrutinized.[19]

Closely related to the fundamental right to political association is the right to vote, and "undeniably the Constitution of the United States protects the right of all qualified citizens to vote, in state as well as in federal elections." *Reynolds v. Sims*, 377 U.S. 533, 554, (1964). "The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government." *Id.* at 555.

Consequently, restrictions on candidacy have been struck down as violative of the "right of qualified voters, regardless of their political persuasion, to cast their votes effectively." *Williams v. Rhodes*, 393 U.S. 23, 30 (1968).

When the choice of parties and candidates on an election ballot has been reduced to two, this leaves an identifiable political group of dissenters with no opportunity to express their strongly held political opposition to the two candidates of the Democratic and Republican parties, effectively abridging their right to cast a vote expressive of their political beliefs. When unnecessary restrictions on the field of candidates thus limits the voter's freedom of choice, the effectiveness of a right to vote is substantially

[19]As applied to the statewide offices at issue in this case, the record shows this is a virtual bar.

impaired. *Illinois State Board of Elections v. Socialist Workers Party*, 440 U.S. 173, 184 (1979). In addition, it must be remembered that candidate Peoples was not merely running for an office in state government but was a candidate for the United States Senate. It has long been recognized that elections for federal office require a higher degree of scrutiny than candidates for local office. *Compare Kirkpatrick v. Preisler*, 394. U.S. 526, 532 (1969) (strict scrutiny) *with Mahan v. Howell*, 410 U.S. 315 (1973). *See also Oregon v. Mitchell*, 400 U.S. 112 (1970).

The third prong of the *Carolene Products* footnote, the concern for the interests of "discrete and insular minorities" is most clearly at stake here, and was addressed explicitly in *Anderson*, 460 U.S. at 793 n. 16. The invidious discrimination inherent in this statutory scheme will be discussed in more detail in Arguments IID and IIID, below.

2. **Both Equal Protection Analysis And First Amendment Analysis Require Careful Scrutiny Of The Impact, Breadth And Justification Of The Resrtictions.**

Traditonal equal protection analysis, as this Court employed in *Williams v. Rhodes*, 393 U.S. 23 (1968), requires strict scrutiny given the impact on fundamental rights apparent in this case. The Equal Protection Clause requires that classifications impacting on personal liberties be drawn narrowly and in conformance with the state purposes they are intended to serve. Legislative distinctions in protected areas must be carefully "'tailored' to achieve the articulated state goal". *Dunn v. Blumstein*, 405 U.S. 330, 357 (1972).

Thus, a legal classification may fail to meet constitutionally required standards in two different ways: the state may fail to introduce adequate evidence to establish that the interest that requires the statute is "compelling," or, alternatively, the state may adopt a means which fails to closely fit the boundaries of the compelling need addressed. The poor fit may be "under-inclusive" by failing to include all persons or things "tainted with the mischief" it is

aimed at; or it may be "over-inclusive" by placing a "burden on a wider range of individuals than...those tainted with the mischief at which the law aims." Tussman & Ten Broek, "The Equal Protection of the Laws," 37 Calif. L. Rev. 341, 344 (1949).

The overbroad law is invalid because it imposes a penalty without a purpose, on individuals placed with a disadvantaged class who are "so different from others of the class as to be without the reason for the prohibitions." *United States v. Carolene Products Co.*, 304 U.S. 144, 154 (1938). Such overbreadth is fatal to a statute which restricts First Amendment activity. *E.g. United States v. Robel*, 389 U.S. 258, 266 (1967) (presumption of danger invalid as applied to appellant.). (Similarly, Appellees here are neither frivolous, nor would a third candidacy be confusing or disruptive). The under-inclusive law is equally suspect. The failure to include all members of the class which threatens the harm "belies" the purported justification. *See SWP v. Secretary of State*, *supra*, 317 N.W.2d at 9; *Goesaert v. Cleary*, 335 U.S. 464, 468 (1948) Rutledge, J., dissenting); *Railway Express Agency v. New York*, 336 U.S. 106, 112-113 (1949) Jackson, J., concurring).

Some laws manage to violate all three of these constraints: the threatened harm is not demonstrated to be compelling by evidence on the record, when the remedy imposed is "under-inclusive", and also "over-inclusive" at the same time--placing in the disadvantaged class some persons or activities that do not belong there, and omitting from that class others which do. Such statutes may arguably fail to pass even the more forgiving "rationality" test, let alone the required strict scrutiny. *See SWP v. Secretary of State*, 412 Mich. 571, 317 N.W.2d 1, 9 (1982); *Kramer v. Union Free School District*, 395 U.S. 621 (1969) (both over-inclusive and under-inclusive). And even if arguably "rational," such laws clearly fail any variety of heightened scrutiny. *See generally*, Gunther, "A Model for a Newer Equal Protection," 86 Harv. L. Rev. 1 (1972).

Another approach was taken in *Anderson*, where this Court chose not to engage in the traditional equal protect-

ion analysis, but rather went directly to the "Fundamental rights" protected by the First and Fourteenth Amendments and implicated by electoral restrictions. 460 U.S. 780, at n.7. This approach is consistent with the Court's handling of earlier cases. *See Williams v. Rhodes*, 393 U.S. 23 (1968), at 30, 35-41 (Douglas, J., concurring), 41-48 (Harlan, J., concurring); *Kusper v. Pontikes*, 414 U.S. 51, 57 (1973); *American Party of Texas v. White*, 415 U.S. 767 (1974) ("Whether the qualifications for ballot access are viewed as substantial burdens on the right to associate or as discriminations against [nonestablished] parties," they could be upheld only if necessary to further compelling state interests. id. at 780).

In either case, the "bite" of judicial review is the same: to decide whether, in aiming at even an established compelling state goal, the state went "beyond what was *necessary*." *Shelton v. Tucker*, 364 U.S. 479, 489 (1960); *see United States v. Robel*, 389 U.S. 258, 266 (the fatal defect of overbreadth"); *see generally*, Note, "The First Amendment Overbreadth Doctrine," 83 Harv. L. Rev. (1970). As is shown below and as held by the Court of Appeals, the State in this case cannot justify the ballot restrictions under any applicable analytical framework.

II. WASHINGTON LAWS ARE UNIQUELY RESTRICTIVE IN REQUIRING A PRIMARY VOTE PERCENTAGE IN ADDITION TO THE NOMINATING PETITION SIGNATURE REQUIREMENT.

The State bases its defense of the new Washington primary vote requirements on an inapt comparison to numbers of petition signatures required in other states. AB 19-20. In fact, as shown below, the two systems are not comparable, either in nature or in effect.

A. Requiring Primary Votes is Qualitatively More Restrictive Than Requiring Nominating Signatures.

This Court upheld Georgia's nominating signature requirement in *Jenness v. Fortson*, 403 U.S. 431 (1971), validating the signature requirement on the grounds that a requirement of a demonstration of a "modicum of support"

for a minor party's ballot placement was a legitimate means to accomplish the goal of keeping the ballot free of a confusing clutter of frivolous candidates. *Id.* at 442. The only such community support requirements ever upheld in practice have been *petition signature* requirements.

The Court pointed out that "Georgia's election laws, unlike Ohio's,[20] do not operate to freeze the political status quo." The reasons included the following:

> Georgia imposes no suffocating restrictions whatever upon the free circulation of nominating petitions. A voter may sign a petition even though he has signed others, and a voter who has signed the petition of a nonparty candidate is free thereafter to participate in a party primary. The signer of a petition is not required to state that he intends to vote for that candidate at the election. A person who has previously voted in a party primary is fully eligible to sign a petition, and so, on the other hand, is a person who was not even registered at the time of the previous election. No signature on a nominating petition need be notarized.

Jeness, supra. Another significant factor was the six month period allowed for collecting the signatures. The Court then went on to rely on the history of success of third party and independent candidates under Georgia election law as its basis for affirming the constitutionality of the law as applied in practice. The Court of Appeals in the present case correctly found the primary vote requirement in this case different, JS at A-1,8, and more restrictive, as applied, than the petition requirements upheld in the past.

Footnote 10 in *Williams v. Rhodes*, 393 U.S. 23, 47 (1968) (Harlan, J., concurring) surveyed each state of the Union's requirements for ballot access for third party candidates. Apparently no state had a requirement of *votes*, as opposed to, or in addition to, *signatures*. The states surveyed had signature requirements as follows:

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[20]The subject of *Williams v. Rhodes, supra.*

Signatures required as a percentage of electorate	Number of states
De minimis to 0.1%	16
0.1% to 1%	26
1.1% to 3%	3
3.1% to 5%	4

Thus, 42 out of the 50 states had *signature* requirements of 1% or less of these voters. State ballot access restrictions were more recently surveyed in "Developments--Election Law," 88 *Harv. L. Rev.* 1111 (1975), where the authors, in 1975, again found no state requiring independents or minor parties to get a percentage of the *vote* in the primary to gain ballot access for the general election.

B. The Only Other Appellate Court Which Has Ever Evaluated The Actual Effects Of The Application Of A Similar Statute--A Primary Vote In Addition To Petition Signature Restriction On Ballot Access--Struck It Down As Irrational And Unnecessary.

Only one appellate decision evaluates the actual effect of a primary vote requirement, as opposed to a straight petition signature requirement, for minor political party ballot access. This is the challenge to apparently the only statutory scheme similar in this regard to the Washington State scheme, the 1976 Michigan requirement that a minor political party get 3/10 of 1% of the primary vote (as compared to the 1% Washington requirement) to get on the general election ballot. A three-judge federal court initially rejected a *facial* challenge to the statute by a 2-1 vote. *Hudler v. Austin*, 419 F.Supp. 1002 (E.D. Mich. 1976). The court did describe the Michigan requirement as unique in the U.S., *id.* at 1012, but refused to declare the statute unconstitutional "in advance" without evidence of its effects, as applied: "What works or doesn't work will always be a hindsight conclusion," *id.*, at 1015-1016. This court summarily affirmed the rejection of the challenge to the statute on its face. *Allen v. Austin*, 430 U.S. 924 (1977).

After the actual impact of this statute could be evaluated as applied in practice, the Supreme Court of Michigan struck it down as unconstitutional, following the guidance

provided by this Court:

> Ballot access implicates two distinct fundamental rights: the right of individuals to associate for the advancement of political beliefs, and the right of qualified voters, regardless of political persuasion, to cast their votes effectively." *Williams v. Rhodes*, 393 U.S. 23, 30 (1968)...Restrictions on access burden these fundamental rights directly. A political party denied access to the ballot is not an effective device for advancing the ideas or political aspirations of its adherents. As a result, access restrictions operate to deter membership and participation in the excluded political association. Voters, faced with statutorily limited ballot choices, may find excercise of the right to vote a Hobson's choice and not an expression of politcal preference, the bedrock of self-governance. This effect is heightened where, as here, restrictions on access work to eliminate political and ideological alternatives at the time major party candidates are selected, and before campaigning had identified and sharpened the issues facing the electorate.

SWP v. Secretary of State, 412 Mich. 571, 717 NW 2d 1, 6 (1982).

The Michigan court rejected the state's claimed justification of avoiding clogging the election machinery, reasoning as follows:

> Yet, the act operated to eliminate plaintiff political party from the 1980 general election ballot before the nine-party capacity of the voting machines was reached. [Three out of the four "new" parties qualified for the general election ballot. One, the Socialist Workers Party, did not.] Such premature elimination is inconsistent with the claimed legislative judgment about when the evils sought to be prevented should be addressed. It follows immediately that the act, as it has been applied, does not use the least drastic means to avoid unreasonable burdens on plaintiffs' constitutionally protected liberty.
>
> Nor it is plausible to argue that the additional restriction on access is *necessary* to further the interests claimed. The primary vote requirement is tied to ballot success (3/10 of 1% of the primary votes cast) and not to the machines whose capacity it is claimed prevents voter confusion and the clogging of the state's election machinery. As a result, the act does not rule out the possibility of *more* than nine parties qualifying for the general election ballot. Although the likelihood of such an event is remote, given the apparent stability of the major polit-

ical parties, a political climate conducive to splintering the electorate could well bring in its train the very evils the act was allegedly designed to avoid but is powerless to prevent.

...

[We] find that elimination of "new" political parties from the general election ballot before the evils sought to be addressed actually arise, violated the requirement that plaintiffs' constitutionally protected liberty be burdened in the least drastic way. By operation of 1976 P.A. 94, plaintiff Socialist Workers Party did not appear on the general election ballet in 1980. We hold that plaintiffs Socialist Workers Party and party member Walden were thereby denied their right to associate in violation of the First and Fourteenth Amendments. We hold further that the right to vote of plaintiffs Lafferty, Moore and Reed was also impermissibly impaired in violation of the First and Fourteenth Amendments.

Id., at 8-9.

This analysis applies equally to Washington's version of the "double requirement" of petition signatures plus primary votes, and likewise requires the invalidation of Washington's requirement--with triple Michigan's vote percentage, and with its proportionately more drastic effects.

C. Similar State Additions To The Petition Signature Requirement For Ballot Placement Have Likewise Been Found Unconstitutional.

In addition to Michigan, other courts have considered and struck down similar added provisos attached to petition requirements. For example, the Sixth Circuit Court of Appeals affirmed a district court's order striking down the Kentucky election law requiring petition signers to declare that they "desire to vote" for the candidate in question, noting

> the Supreme Court has never approved a declaration similar to the Kentucky 'desire to vote provision.' In fact, part of the reason why the Supreme Court approved the Georgia election law in *Jenness* was because that law *did not* require petition signers to state that they intended to vote for the candidate in the general election.

Anderson v. Mills, 664 F.2d 600, 610 (6th Cir. 1981). Another federal district court struck down the North Carolina requirement that petition signers affiliate with the party whose candidate they were asking be placed on the ballot. *N.C. SWP v N.C. State Board*, 538 F.Supp. 864 (E.D.N.C. 1982).

The reasons behind the distinction between ballot access and ballot success were pointed out by another federal court, in ordering Gus Hall and Angela Davis placed on the Michigan ballot as the Presidential candidates of the Communist Party:

> Defendents assert that altough Hall conducted presidential campaigns in the past, he never received more than a few thousand votes in any given race. But *electablility in not an appropriate prerequisite for ballot access.* The real question is whether there is enough support for placing a given candidate on the ballot, not whether there is enough support for electing the candidate. A large segment of the public may be determined never to vote for Hall and Davis yet may wish to see them on the ballot and support their effort to get them put on the ballot. Another segment of the population may be attracted to Hall and Davis, may find their viewpoint appealing, and may even support their candidacy in various ways. Yet when the members of this sympathetic constituency finally enter the voting booth, they may decide to vote for candidates with a greater likelihood of success. Considering Hall and Davis's support in this sense--putting aside the question of their vote-getting ability--the court is bound to conclude that they have substantial community support.

Hall v. Austin, 495 F.Supp. 782, 790 n.12 (E.D. Mich. 1980). The court there pinpointed the precise defects in the Washington primary *vote* requirement, which instead of testing community support for ballot placement, applies the much different criterion of electoral success, in a political context in which substantial vote tallies are extremely unlikely. This results not only from the limitations of the primaries to which minor parties have been relegated, discussed in the next two sections of this brief, but also from the dominant positions of the Democratic and Republican parties in our two-party system:

Preferences are of course shaped by the available opportunities and the existing allocation of power. The phenomenon of "sour grapes" reflects the fact that in some circumstances people reject opportunities because they perceive them to be unavailable. Preferences adapt to the available options; they are not autonomous. [Citations omitted].

C. Sunstein, "Interest Groups in American Public Law," 38 Stan. L. Rev. 29,82 (1985).

D. The Relatively Early Qualification Deadline Discriminates Against Minor Parties.

The 1977 amendments changed the minor party qualification deadline from the date of the September primary to a new date in July, the Saturday of the week prior to the week in which major party candidates declare for the primary. R.C.W. 29.24.020. This put an additional substantial burden on minor parties, discriminating against them compared to major parties, which is identical in kind to the discrimination condemned in *Anderson v. Celebrezze*, *supra*. Even though it is quantitatively less extreme, there is no question that this is a substantial "burden that falls unequally on new or small political parties...[and thus] impinges, by its very nature, on associational choices protected by the First Amendment." *Anderson*, 460 U.S. at 793.

It is not the calendar date, or the relationship to other state deadlines, but the relationship to the deadlines in the Washington State major party candidate selection process that makes the deadlines for minor parties and independents "relatively early" and therefore suspect.

The Court in *Anderson* summarized the difficulties arising from a relatively early deadline. Not only are campaigns based on later developments made impossible, but the minor party campaign itself is made marginal and insignificant:

> When the primary campaigns are far in the future and the election itself is even more remote, the obstacles facing an independent candidate's organizing efforts are compounded. Volunteers are more difficult to recruit and retain, media publicity and campaign contributions are more difficult to secure and voters are less intersted in the campaign.

Anderson, 460 U.S. at 792, citing *Bradley v. Mandel*, 449 F.Supp. 983 at 986-987 (1978) (findings of fact of three judge district court).

The reasons for the lack of public and media interest in the elections at the primary stage are not difficult to discern. The record relects that fewer than half the registered voters participate in presidential election years, generally fewer than one-third in other primary elections. The electorate is apparently aware that the September primary is not really an election, because in it no one can be elected. The most a candidate can gain is the nomination of his or her party for the race on the election ballot in November. In other words: "The purpose of a primary election is to narrow the field of candidates to one per party, in order that the general election might be reserved for major struggles, not intra-party feuds." *Cross v. Fong Eu*, 430 F. Supp. at 1038 n.2. The Washington system inappropriately relegates minor parties' already selected candidates to this mechanism in which internal party politics and candidate selection by the major parties are what is perceived by the public to be at stake. Since there was only a single SWP candidate on the primary ballot, without explanation, a reasonable voter might assume that this candidate would appear on the general election ballot as the SWP nominee, as could a single major party candidate for the nomination.

In short, prior to the amendments, major and minor party nominees alike campaigned from the September candidate selection process to the November general election, participating in the "major stuggles" of ideas, programs, and political visions. The new restrictions have effectively eliminated minor party candidates for statewide office prior to the identification of major party nominees, prior to the sharpening of the issues and the signficant events of the real campaign, and have relegated minor parties to the political thicket of the "intra-party feuds" of the primary candidate selection process.

E. The 1977 Amendments Inflict On Minor Parties The Very Evils The Restrictions Are Supposed To Eliminate.

If the primary election is offered to minor parties as a constitutional substitute for general election ballot access (AB 18-19)--as "their chance" to reach the electorate--why are minor parties not deserving of the protection from a cluttered and confusing ballot the state ostensibly has a compelling interest in protecting? The general effect of the amendments was to take minor party nominees off the general election ballot (which was not crowded) and put them on a primary ballot (which is crowded).

The specific effect of these new restrictions on Plaintiffs was to take cadidate Peoples off what would have been a three candidate ballot and put him on what became a 34 candidate ballot. This in the name of reducing ballot crowding and voter confusion!

The relatively crowded primary ballot arises from the differential treatment of major party candidates, allowing them on the primary ballot as a result of a simple self-declaration, without the nominating convention petition requirement imposed on minor party candidates. There is no numerical limitation on major party candidates for the nomination in the primary election. This delays the possibility of any effective debate on the major issues in the election until after the field of candidates has been limited to one per party. Meaningful candidate forums, community meetings, public debates would be impossible until after the primary election has taken place, given the crowd of candidates competing in the primary.

All of the evils of unlimited ballots discussed in the cases ballot clutter, frivolous candidacies, voter confusion--prevent minor parties now stuck in the primary from effectively participating in the real election campaign, to reach out to the electorate with new ideas.

> By limiting the opportunities of independent minded voters to associate in the electoral arena to enhance their political effectiveness as a group, such restrictions threaten to reduce diversity and competition in the marketplace of ideas. "The primary values protected by the First Amendment--a profound national commitment to the principal of debate on public issues should be uninhibited, robust, and wide-open," --are served when election campaigns are not monopolized by the existing political parties.

Anderson, supra, at 460 U.S. 794. It is such a monopoly on the general election process that the Court of Appeals appropriately restrained when it found the relegation of minor parties to the primary election unconstitutional.

III. THE COMBINED EFFECT OF THE EXTRA BURDENS NEWLY IMPOSED ON MINOR PARTIES HAS SUBSTANTIALLY BARRED THEM FROM PARTICIPATION IN GENERAL ELECTIONS FOR STATEWIDE OFFICE.

A. The Effect On Minor Parties Has Been Dramatic.

Historically, the elections of greatest interest to minor parties such as the Socialist Workers Party have been for state-wide office, such as Governor, and national office, such as U.S. Senate. There are two obvious reasons for this: first, the program of the Socialist Workers Party focuses on fundamental issues of national policy such as military affairs and the control of the economy. These issues are more appropriately addressed at a national level of government, or at least state-wide. Second, minor political parties are, by definition, new or small. Their base of support is frequently concentrated in one or a few areas, most often urban. By means of a state-wide campaign they can bring their new and different ideas to a larger audience, to voters who are frequently unfamiliar with their message. State-wide campaigns for state and federal offices are seen as an essential method of expanding the range of possibilities considered by the public in what is seen for most citizens of the United States as the primary, if not sole, means of exercising any political choice: the elections.

For these reasons, the election for Governor has attracted the widest participation by minor parties. As summarized by the Court of Appeals:

> At least one minor party appeared on the general election ballot in every Washington gubernatorial election from 1896 to 1976 except 1952. Two or minor party candidates qualified in all but two of these elections. Forty minor party candidates appeared on the general election ballot for state-wide offices in the five general elections between 1968 and 1976.

JS at A-4.

As Table I, at page 5-6 above indicates, the number of minor party candidates participating in the U.S. Senate elections has been somewhat smaller than in the Governor's race, but still regular.

The Court of Appeals fairly characterized the effect of the new 1977 restrictions on minor parties as working "a striking change" on the choices available to Washington voters:

> According to the affidavit of Washington Supervisor of Elections, since 1977 minor parties "have not been successful at qualifying candidates for the state general election ballot for state-wide offices." Although one or more minor parties nominated candidates in each of the four state-wide elections held between 1978 and 1983, none qualified for the general election ballot. In 1984 one of four minor party candidates nominated qualified for the general election ballot.

JS at A-4.

These figures are supported by the record. JA 79. They should be contrasted with the misleading tables presented by the Appellant at page 8 of this brief. The Chart is an apparent attempt to obscure the admitted exclusion of minor parties from state-wide races by loading the table with unidentified candidates for local office such as county commissioner, state legislator, and so forth, from various unidentified communities around the state of Washington. These figures were not put on the record before the Disrict Court or the Court of Appeals below, and rightly so, because they do not relate to any issue before those courts, which were not asked to consider or rule upon elections to local office. The only issue raised by the pleadings or ruled upon by the courts below was the effect of the restrictions on the 1983 election for U.S. Senate, and other similarly situated candidates for state-wide office who have been, almost universally, excluded from the general election ballot.

The state devotes precisely two paragraphs to its discussion of the crucial question: "What has been the effect of Washington's system on minor parties?" These are the two paragraphs on page 22 of Appellant's Brief which discuss the newly created tables lumping together state-wide candidates with those for local office such as county commissioner, etc. With regard to the offices at issue in

this case, namely state-wide offices such as U.S. Senate, we have merely the Supervisor of Elections' blanket admission of failure of the new electoral scheme to let minor parties on the ballot, which was cited by the Court of Appeals, and the single sentence in the State's Brief which only admits, in the most understated language, the crucial facts of this case: "For state-wide offices, minor party candidates have not done well since 1977." AB 22. They have not, and it is because of the unjustified 1977 ballot law amendments.

B. No Evidence Supports The Appellant's Attempt To Blame Minor Parties For Their Own Exclusion From The Ballot.

In its two-paragraph attempt to explain the almost total exclusion of minor parties from the state-wide ballot on page 23 of its Brief, the state admits that since there is nothing on the record to support their position, "we can only surmise." The state goes on to argue, nevertheless, that the exclusion of minor parties from the state-wide general election ballot should be blamed on the minor parties themselves: on their lack of spending, or their lack of effort.

It is true that there may be a correlation between the level of spending and electoral success. In fact, some 73 percent of voters surveyed thought campaign spending had "a great deal of effect" on the outcome of the election. Such feelings lead to "growing political alienation, declining confidence in political institutions, and steadily decreasing voter turnout." Shockley, "*Corruption, Undue Influence and Declining Voter Confidence*," 39 Miami L. Rev. 377, 379.[21] *See also Wright, "Money and the Pollution of*

[21]In support of this assertion, Shockley cites a University of Michigan study asking citizens the following question: "Would you say that the government is pretty much run by a few big interests looking out for themselves or that it is run for the benefit of all people?" Gradually, more people have responded that they believe that a few big interests run government. In 1958 only 18% of the respondents agreed with that view, but by 1980 76% believed that a few big interests run government. Opinion Roundup, 4 Pub. Opinion 34 (1981). Shockley also cites W. Crotty & G. Jacobson, American Parties in Decline (1980), 5, 13 noting that "in comparison with 21 other democratic countries, the United States ranks last...non-voters are basically inactive on all levels. If people do not vote, the chances are excellent that they will not participate in any other form of political process. In effect, they remain outside the political system, unrepresented and ignored."

Politics, 82 Colum. L. Rev. 609 (1982); E. Drew, *Money and Politics* (1984); T.M. Sell, *Riding the Milkwagon: The Effect of Money on the Outcomes of Legislative Races, 1974-1982* (Washington State Public Disclosure Commission, 1982).

It is clear, nevertheless, that restrictions which would bar minor parties from the ballot because of their lack of affluence would be unconstitutional. *Lubin v. Panish*, 415 U.S. 709 (1974). There may now be the equivalent of a $100,000 filing fee to be a "serious" candidate for U.S. Congress, if seriousness is to be measured solely in terms of spending, and related electoral success. But to institutionalize such a requirement, which is the logical extension of the State's argument, would seem directly in conflict with the principle of *Bullock v. Carter*, 405 U.S. 134 (1972) (invalidating excessively high filing fee).

Furthermore, to exclude a third or fourth point of view from the otherwise two party debate in the election campaign, the central political forum in our democracy, on the grounds that the minority point of view is inadequately funded is to turn the First Amendment on its head. *See* Meiklejohn, *Free Speech and Its Relation to Self Government* (1948).

The time-honored commitment of the First Amendment to "free, robust, and wide-open" debate, *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964), recognizes that the main danger is the exclusion of a point of view, not the inclusion of too many. "That the air may at times seem filled with verbal cacophony is...not a sign of weakness but of strength." *Cohen v. California*, 403 U.S. 15, 25 (1971). And certainly it would be stretching a point to argue that a third point of view, in addition to the major parties' points of view which are so similar on many issues, would create a "verbal cacophony" in the general election. "'Public

discussion is a citizen's duty.' As a society we have more to fear from an inert than an active citizenry. Fear and repression menace stable government; speech does not." Powe, "Mass Speech and the Newer First Amendment," 1982 Supreme Court Rev. 243, 281, citing *Whitney v. California*, 274 U.S. 357, 375-377 (1926) (Brandeis, concurring).

The Court in *Buckley v. Vallejo*, 424 U.S. 1 (1976) and *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978) recognized that even the rich have a right to freedom from unjustified burdens on their participation in elections. ("Governmental action which may have the effect of curtailing the freedom to associate is subject to the strictest scrutiny." *Buckley*, 424 U.S. at 25) (State must show compelling interest, *Belotti*, 435 U.S. at 786). Thus, to enhance the effectiveness of the marketplace of ideas, the government can constitutionally promote equality only by multiplying and improving opportunities for disadvantaged candidates to express their views. Note, "Equalizing Candidates' Opportunities for Expression," 51 Geo. Wash. L. Rev. 113, 114-115 (1982).

If "enhancement" of the effectiveness of the marketplace of ideas by limiting the voice of actors so powerful they threaten to drown out others[22] is impermissible, as *Buckley* held, so much the more impermissible should it be to "enhance" the forum for the two major parties by excluding minor parties from the debate on the grounds of their relative "weakness" or inadequate funding.

Finally, the State speculates that exclusion of minor parties from statewide races might result "if minor parties tend to focus their efforts on local, rather than statewide races...." First, there is nothing on the record to support this pure speculation in the Appellant's Brief. Second, the facts of this case are that the *only* race Plaintiffs were involved in in the election at issue, was the race for U.S. Senate, a statewide race. Third, as discussed above, the issues involved in races for federal office and statewide

[22] *Cf. Red Lion Broadcasting v. FCC*, 395 U.S. 367, 387 (1969) ("the right of free speech for a broadcaster, the user of a sound truck or any other individual does not embrace the right to snuff out the free speech of others.").

office are the ones that are most attractive to minor parties, and therefore, historically, have attracted the most minor party participation and effort. Neither logic nor the record lend any support at all to this "surmise," and no weight should be given by this Court to the Appellant's suggestion that minor party lack of money or lack of attention to statewide races justify exclusion of minor parties from the statewide general election ballots.

C. The Courts Below Appropriately Limited The Scope Of The Decision To The Statewide Office Issues Raised In This Case.

The Plaintiffs below brought this case to challenge their exclusion from the election for the office of United States Senate. They supported their challenge to the constitutionality of the statute, as applied to them, by evidence that it had a similar effect on similarly situated voters and candidates for other statewide offices throughout the life of the statute at issue--namely, those involved in statewide office elections such as United States Senate and Governor. The State did not challenge this delineation of the issues before the trial court or before the Court of Appeals.

Now, for the first time, before this Court, the State apparently argues that the courts below should have considered a different issue, more to its liking: the effect of the statute on minor parties running for local offices, such as county commissioner, etc. Or perhaps the State is complaining that the Court of Appeals evaluated the statute as applied, rather than finding it unconstitutional on its face.

Sometimes a statute is so substantially overbroad that the Court *should* invalidate it on its face. *E.g., Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975). However, frequently when a challenge is made to a statute as applied, by one engaging in protected activity, the Court limits its holding to the protected activity, leaving the statute to be potentially applied to other activities. *E.g., Spence v. Washington*, 418 U.S. 405 (1974). The validity of this principle has

been specifically applied in the context of the First Amendment protections for minor parties' participation in election campaigns. In *Brown v. Socialist Workers*, 459 U.S. 87 (1982), the Court did not strike down the public disclosure provisions as unconstitutional on their face, but held them invalid only as applied, to the SWP, as a "minor" party. Even a statute which is challenged with a broad, facial attack may be found valid in some of its applications and invalid in others. *See*, eg., *Metromedia Inc. v. City of San Diego*, 453 U.S. 490, 521 n. 26 (1985).

The fact that Plaintiffs, seeking to participate in a statewide election for U.S. Senate, did not claim to be burdened by the application of these restrictions to elections for local offices, such as county commissioner, does not make their exclusion from participation in the critical statewide election in question constitutionally permissible. Courts, even more than legislatures, ordinarily proceed "one step at a time." *Cf. Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U.S. 483, 489 (1955). The State here presents no substantial reason why it would be impossible, or even difficult, to continue to enforce the challenged restrictions as to local elections while returning to the *status quo ante* with regard to statewide elections.

In previous cases, this Court has had no difficulty making a decision limited to the portions of an electoral scheme which were presented for decision, *see, Moore v. Oglivie*, 394 U.S. 815 (1969), even if this arguably left the statutory scheme in an irrational patchwork. *See Ill. St. Bd. of Elec. v. SWP*, 440 U.S. 173, 191 (1979) (Rehnquist, concurring). But again, there is no suggestion that such is the result here. Other states have recognized the differential difficulty in ballot access at the local and statewide levels, and such schemes have been upheld. *American Party of Texas v. White*, 415 U.S. 767, 775 n.7 (1974) (higher percentage of electorate petition signatures required for local office than for state office) (*compare Ill. St. Bd. of Elec. v. SWP, supra:* higher absolute number of signatures for local office qualification than for state office would be irrational).

Given the difference in difficulty of qualification

demonstrated by the record here, in the absence of any substantial justification for the differential burden offered by the State, we are left with the superficially attractive but empty argument of bare "equal treatment." Such abstract justifications of measures which are unjustifiably discriminatory as applied are uniformly rejected:

> As we have written, "[s]ometimes the grossest discrimination can lie in treating things that are different as though they were exactly alike." *Anderson v. Celebrezze*, *supra* 460 U.S. at 801, *quoting Jenness v. Fortson*, 403 U.S. 431, 442 (1971).

The Court of Appeals correctly limited its decision to the statewide office issues presented in the case before it, and came to the correct conclusion.

D. The Exclusionary Mechanism Of This Law Falls Unequally On New And Small Political Parties And Discriminates Against Voters Who Wish To Cast A Collective Vote Of Dissent From The Status Quo.

> Even though the drafting of election laws is no doubt the handiwork of the major parties that are typically dominant in the state legislatures, it does not follow that the particular interests of the major parties can automatically be characterized as legitimate state interests.

Anderson v. Celebrezze, 460 U.S. at 803 n.30. On the contrary.

> Because the interests of minor parties and independent candidates are not well represented in the state legislatures, the risk that the First Amendment rights of these groups will be ignored in judicial decision making may warrant more careful judicial scrutiny.

Id. at 793. n.16.

A necessary concomitant of majority rule, under our repulican form of government, is the protection of minority interests. *United States v. Carolene Products Company*, 304

U.S. 144, 152 n.4 (1938); J. Ely, *Democracy and Distrust: A Theory of Judicial Review* 73-88 (1980) (judicial role in seeing that certain groups are not "fenced out" of the pluralist process).

The Court of Appeals correctly notes that, "as a practical matter, the [1% vote requirement] affects only minor parties." JSA-2 What motivated this discriminatory new burden on minority participation in elections? The answer to this question can be gleaned from the legislative history of the 1977 amendments.

One reaction to the declining voter confidence in the major political parties has been the formation of new or "protest" political parties. An example of this, discussed in Appellant's Brief at p.8, was the 1976 formation of the "OWL" Party. This group was organized by a well known entertainer in the state capitol, and fielded a full slate of candidates for state-wide office under the slogan "Throw the Rascals Out," with a platform intended as a lampoon of the major parties. Its ballot placement functioned as the equivalent of a "none of the above" vote option.

This managed to deeply offend both the Democratic and Republican members of the state legislature.

As a result, the risk warned against in *Anderson*[23] came to pass. In one of the few declarations of legislative intent recorded in the sparse legislative history preserved in the State of Washington, one of the sponsors warned his colleagues of the dangers posed by the minor parties targeted by the bill:

> They appear to be taking on the characteristics of a major party and unless maybe some of us get to work they might present a bigger problem.

1977 House Journal 696, Washington State Legislature. The resulting change in election law did help the major parties by keeping minor parties out of statewide general elections.

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[23] *Supra*, at 793 n. 16.

But such sentiments would of course be anathema to the Founding Fathers, such as Thomas Jefferson who saw political upheaval as "productive of good. It prevents the degeneracy of government and nurses a general attention to... public affairs. I hold...that a little rebellion now and then is a good thing." Letter to Madison, January 30, 1798. More recently, we were reminded:

> Our form of government is built on the premise that any citizen shall have the right to engage in political expression and association. This right was enshrined in the First Amendment and the Bill of Rights. Exercise of these basic freedoms in America has traditionally been through the media of political associations. Any interference with the freedom of a party is simultaneously an interference with the freedom of its adherents. All political ideas cannot and should not be channeled into the programs of our two major parties. History has amply proved the virtue of political activity by minority, dissident groups, who innumberable times have been in the vanguard of democratic thought and whose programs were ultimately accepted. Mere unorthodoxy and dissent from the prevailing mores is not to be condemned. The absence of such voices would be a symptom of grave illness in our society.

Sweezy v. New Hampshire, 354 U.S. 234, 250-251 (1957).

Some scholars have advanced the theory that legislative behavior may be explained as seeking the single-minded goal of re-election. *See* C. Sunstein, "Interest Groups in American Public Law," 38 Stan L. Rev. 29, 48 n.78 (1985). The danger to minority rights has been seen as increasing the need for a branch of government to take a "sober second look" at political outcomes. *See* A. Bickel, *The Least Dangerous Branch* (1962).

In *Department of Agriculture v. Moreno*, 413 U.S. 528 (1973), the Court invalidated the exclusion of "non-related individuals" from the Food Stamp Program, on the grounds that the exclusion reflects "a bare...desire to harm a politically unpopular group," which "cannot constitute a legitimate governmental interest." *Id.* at 534. *See also City of Cleburne v. Cleburne Living Center*,

105 S.Ct 3249 (1985).[24]

While invidious intent is not required for a ballot access restriction to be invalid,[25] it certainly makes a difference. "Even a dog," as Justice Holmes said, "distinguishes between being stumbled over and being kicked." O. Holmes, *The Common Law* 3 (1881). (Quoted in Sunstein, *supra.*, at 80).

When the apparent purpose and obvious result of the new restrictions on minor parties challenged here is so clearly invidious, the deference otherwise due a legislative determination is certainly diminshed.[26]

If the First Amendment is to work anywhere, it must be here in political campaigns:

> [I]f it be conceded that the First Amendment was "fashioned to assure the unfettered interchange of ideas for the bringing about of political and social changes desired by the people," then it can hardly be doubted that the constitutional guarantee has its fullest and most urgent application precisely to the conduct of campaigns for political office.

Monitor Patriot Co. v. Roy, 401 U.S. 265, 271-272 (1971).

IV. THE STATE HAS FAILED TO ESTABLISH THAT IT HAS ADOPTED THE LEAST RESTRICTIVE MEANS OF LIMITING MINOR PARTY ELECTION PARTICIPATION TO A REASONABLE NUMBER OF SERIOUS CANDIDATES.

In addition to demonstrating the compelling state inter-

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[24]The purpose of heightened scrutiny is to detect the results of illegitimate motives in cases in which such motives are especially likely to be at work. *Cf* Brest, Foreword, "In Defense of the Anti-Discrimination Principle," 90 Harv. L. Rev. 1 (1976).

[25]*E.g.*, *Illinois State Board of Elections v. Socialist Workers Party*, 440 U.S. 173 (1979).

[26]L. Tribe, *American Constitutional Law* 774 (1978) (courts should be wary of governmental attempts to control the electoral system, which is the fundamental check on its power.)

est that requires its new restrictions on political participation, the state must also demonstrate that less restrictive means would not suffice to accomplish any legitimate state goal. "The regulation can survive only if the governmental interest outweighs the burden, and cannot be achieved by means that do not infringe First Amendment rights as significantly." *Minneapolis Star and Tribune Company v. Minnesota Commissioner of Revenue*, 460 U.S. 575, 585 n.7 (1983). This is particularly the case in limitations on the fundamental rights of political association and voting: "'Precision of regulation must be the touchstone in an area so closely touching our most precious freedom.'" *Anderson*, 460 U.S. at 806, *quoting NAACP v. Button*, 371 U.S. at 438.

The record contains no such demonstration by the State here. The evidence on the record is totally contrary to any such assertion. *First*, as pointed out above, *see* Argument II. A. at page 26, the other states of the Union have successfully regulated minor party ballot access with nominating petition signature requirements alone, without the addition of the second stage primary vote requirement which has so adversely affected minor parties in Washington.[27] *Second*, the historical experience in the State of Washington itself belies the need for the new restrictions. The successful regulation of minor party ballot access under the pre-existing nominating petition signature requirements constitutes a solid demonstration of the effectiveness of these less restrictive means in this very state. *Third*, the legislature adopted the new restrictive provisions only by specifically rejecting a less restrictive bill. 1977 House Journal 497. This version of the bill preserved the former system of placing minor party nominees who met the nominating signature requirements directly on the general election ballot, with no primary vote requirement in addition. This less restrictive scheme was passed by the House by a large margin of 70 to 20. 1977 House Journal 696. Only when the Senate repeatedly refused to accede to the

[27]*Cf. Lubin v. Panish*, 415 U.S. 709 (1974) (filing fee not permissible as means to limit the ballot and avoid voter confusion when petition signatures would be less restrictive of voting and associational rights).

less restrictive House version, 1977 Senate Journal 1611-12, did the House finally agree to pass the more restrictive Senate version. 1977 House Journal 1976.[28]

Fourth, at the same time the legislature added the second tier primary vote qualification requirement, it increased the petition signature requirement. A much greater increase in the petition signature requirement would certainly have served to keep "crank" or frivolous candidates off the ballot (if there were any evidence that such increased restrictions were necessary) without excluding the serious minor parties harmed by the scheme actually adopted. The record indicates that the Socialist Workers Party has gathered nation-wide over 500,000 signatures on nominating petitions to obtain ballot placement for its candidates in the various states. Affidavit of Hickler, J.A. 51.[29] Finally, as an example of such a less restrictive alternative scheme, Appellees would point out the provisions of House Resolution 2320: "A bill to enforce the guarantees of the First, Fourteenth, and Fifteenth Amendments to the Constitution of the United States by prohibiting certain devices used to deny the right to participate in certain [federal] elections." A copy of the bill is attached hereto as Appendix B. This bill would limit ballot access restrictions imposed by the states on candidates in federal elections, such as this one for U.S. Sentate, to a petition signature requirement of not more than 1/10 of 1% of the total vote for the office in the previous election, and would provide that the signatures might be gathered in at least a seven month period. Such a measure would permit a substantial increase in Washington's petition signature requirements, while allowing minor parties more time in which to gather them than the one day presently allowed, and would prohibit the primary vote requirement

[28]*Cf. Kirkpatrick v. Preisler*, 394 U.S. 526 (1969) (disricting scheme invalidated when Missouri Legislature had before it an alternative plan with smaller deviations from the ideal).

[29]*Cf. American Party v. White, supra*, 415 U.S. at 779 (SWP met signature requirement of 22,354 qualified voters.)

that now so effectively excludes them from the general election.

Appellees are not arguing that the House Bill, or any particular ballot access procedure is constitutionally required. But the existence of a simple, adequate, less restrictive alternative is certainly relevant to the necessity of a measure which has purged the ballot of the few minor parties who qualify candidates under the existing scheme. A limitation of First Amendment freedoms must be no greater than is necessary[30] or essential to the protection of the particular governmental interest established. *Procunier v. Martinez*. 416 U.S. 396 (1974). *See also Bursey v. United states*, 466 F.2d 1059, 1088 (9th Cir. 1973) ("When First Amendment interests are at stake, the government must use a scalpel, not an ax."). The State in this case clearly went much further than necessary especially where there was no apparent need for more ballot restrictions in the first place.

[30]The Court of Appeals correctly pointed out that the exclusionary effect of this new legislation may simply have been a mistake, citing the memorandum from the Office of Appellant stating that some 75% of the parties and candidates would qualify for the general election ballot, though "contrary to this prediction, minor party candidates have been substantially eliminated from Washington's general election ballot. J,S, A-4. Of course, an exclusion not intended by the legislature, or taken into account, cannot be "closely tailored" to a state goal. "When delicate and cherished First Amendment rights are at stake...the constitutional tolerance for error diminishes dramatically." *Minneapolis Star*, *supra* at 460 U.S. 589 n. 12. *See U.S. v. Carolene Products Co.* 304 U.S. 144, 153 (1938) (Statute would be unconstitutional as applied to one not causing targeted harm.). And *see Chastelton Corp. v. Sinclair*, 264 U.S. 543, 547, (1926) ("A court is not at liberty to shut its eyes to an obvious mistake.").

CONCLUSION

This issue presented in this case is the impact of Washington's new ballot access laws on minor parties' ability to run in statewide general elections. The facts show that this impact has been draconian. This profound effect on fundamental constitutional rights has not been justified by any of the State's arguments, particularly when there are any number of less invasive alternatives available to advance the State's purported interests. The Court of Appeals correctly held this statute invalid as applied to statewide races. This Court should affirm.

Respectfully submitted,

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APPENDIX A: CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution Of The United States:
Article I
§ 4. Election of Senators and Representatives

Section 4. The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.

AMENDMENT I.

Freedom of religion, speech and press; peaceful assemblage; petition of grievances

Congress shall make no law respecting an establishment of religion, or prohibiting the free excercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

AMENDMENT XIV.

§ 1. Citizenship rights not to be abridged by states

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

AMENDMENT XVII.

Popular Election of Senators

The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years; and each Senator shall have one vote. The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures.

Statutes: Washington Revised Code

29.24.020 [New] Nomination by convention or write-in —Date for convention—Multiple conventions by single party

Any nomination of a candidate for partisan public office by other than a major political party shall only be made either: (1) In a convention held on the last Saturday immediately preceding the first day for filing declarations of candidacy specified in RCW 29.18.030 or fixed in accordance with RCW 29.68.080 or 29.68.090; or (2) as provided by RCW 29.51.170. A Minor political party may hold more than one convention but in no case shall any such party nominate more than one candidate for any one partisan public office or position.
Amended by Laws 1977, Ex.Sess., ch. 329, § 2, eff. June 30, 1977.

29.24.020 [Former] Minor parties must hold convention on state primary day.

Any new or minor political party is not entitled to participate in a state primary election but must nominate candidates for public office in a convention held on the same day that state primary elections are held.

29.24.030. [New] Requirements for validity of convention

To be valid, a convention must:

(1) Be attended by at least a number of individuals who are registered to vote in the election jurisdiction for which nominations are to be made, which number is equal to one for each ten thousand voters or portion thereof who voted in the last preceding presidential election held in that election jurisdiction or twenty-five such registered voters, whichever number is greater;

(2) Have been called by a notice published in a newspaper of general circulation published in the county in which the convention is to be held at least ten days before the date of the convention stating the date, hour, and place of meeting. The notice shall also include the mailing address

of the person or organization sponsoring the convention, if any.

29.24.030 [Former] Minor party convention-Procedure.

To be valid, a minor party convention must:

(1) Be attended by at least one hundred registered voters; or in lieu thereof ten registered voters from each congressional district in the state of Washington;

(2) Have been called by a notice published in a newspaper of general circulation published in the county in which the convention is to be held at least ten days before the date of the primary election stating the date, hour, place of meeting and a general statement of the principles of the organization.

29.18.025. [New] Declarations of candidacy—Certain offices, when filed

Except where otherwise provided by state law, declarations of candidacy for the following offices shall be filed during regular business hours with the secretary of state or the county auditor no earlier than the last Monday in July and no later than the following Friday in the year in which the office is scheduled to be voted upon:

(1) Offices that are scheduled to be voted upon for full terms or both full terms and short terms at, or in conjunction with, a state general election; and

(2) Offices where a vacancy, other than a short term, exists that has not been filled by election and for which an election to fill the vacancy is required in conjunction with the next state general election.

29.18.020 [Former] What political parties may participate.

Only the names of major political parties shall be entitled to appear upon the primary election ballot after the names of the candidates affiliated therewith. The name of no other political party shall appear thereon.

29.18.020. [New] What candidates shall appear on ballot

The names of the candidates of the major political

parties and those independent candidates and candidates of minor political parties who have been nominated pursuant to the provisions of chapter 29.24 RCW shall appear upon the partisan primary ballot: *Provided*, That candidates for the positions of president and vice president shall not appear on the partisan primary ballot. The name of no other candidate shall appear thereon.

29.30.100 [Former] General election ballots—What names to appear.

The names of the persons certified as the nominees resulting from a primary election by the state canvassing board or the county canvassing board shall be printed on the official ballot prepared for the ensuing election.

No name of any candidate whose nomination at a primary is required by law shall be placed upon the ballot unless it appears upon the certificate of either (1) the state canvassing board, or (2) the county canvassing board, or (3) a minor party convention, or (4) of the state or county central committee of a major political party to fill a vacancy on its ticket occasioned by any cause on account of which it is lawfully authorized so to do.

29.18.110 [New] Number of votes for appearance on general election ballot

No name of a candidate for a partisian office shall appear on the general election ballot unless he receives a number of votes equal to at least one percent of the total number cast for all candidates for the position sought. *Provided*, That only the name of the candidate who receives a plurality of the votes cast for the candidates of his party for any office shall appear on the general election ballot.

If there are two or more positions of the same kind to be filled and more candidates of a party receive a plurality of the votes cast for those positions than there are positions to be filled, the number of candidates equal to the number of positions to be filled who receive the highest number of votes shall be the nominees of their party for those positions.

APPENDIX B

H.R. 2320

A bill to enforce the guarantees of the first, fourteenth, and fifteenth amendments to the Constitution of the United States by prohibiting certain devices used to deny the right to participate in certain elections.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled.

SECTION 1. BALLOT ACCESS RIGHTS

A State shall not use any device to abridge or deny the right of an idividual to be placed as a candidate on, or to have such individual's political pary, body, or group affiliation in connection with such candidacy placed on, a ballot or similar voting materials to be used in Federal election.

SEC. 2. DEFINITION OF DEVICE

For the purposes of this Act, the term "device" means any requirement, condition, or prerequisite to being placed on, or having individual's political party, body, or group affiliation placed on, a ballot or similar voting materials, other than a requirement, condition, or prerequisite described in section 3.

SEC. 3 ALLOWED REQUIREMENTS FOR BALLOT ACCESS.

(a) Petition. - A State may impose any or all of the following requirements, conditions, or prerequisites:

(1) That an individual seeking to excercise rights protected by by this Act present a petition stating in substance that the signatories desire such individual's name and political party, body, or group affiliation to be placed on the ballot or other similar voting materials to be used in the

Federal election with respect to which such rights are to be excercised.

(2) That the political party, body, or group affiliation, if any, of such individual be shown on such petiton.

(3) That such petiton, to be effective, must have not more than the greater or -

(A) 1000 signatures: or

(B) a number of signatures equal to 1 tenth of 1 percent of the number of registered voters on the date of the most recent previous Federal election, if any, for the office for which such individual is a candidate who voted in such election for such office.

(4) That such petition may be signed only by persons residing anywhere in the bounds of the geographic area from which an indivdual is to be elected to such office.

(5) That such petition may be circulated only during a period -

(A) beginning not later than the 270th day before the date of the election with respect to which such rights are to be exercised; and

(b) ending not earlier than the 60th day before the date of such election.

(b) PARTY VOTE - A State may impose the requirement, condition, or prerequisite that, in order to have an individual's political party, body, or group affiliation placed on a ballot or similar voting materials to be used in the Federal election with respect to which rights protected by this Act are to be exercised, without having to satisfy any requirement relating to a petition under section 3(a), that or another individual, as a candidate of that political party, body, or group, must have received whichever is the lesser of-

(1) 20,000 votes: or

(2) 1 percent of the votes cast:

in the most recent general Federal election for President or Senator in that State.

SEC. 4. RULEMAKING.

The Attorney General may make rules to carry out this Act.

SEC. 5. GENERAL DEFINITIONS.

As used in this Act-

(1) the term "Federal election" means a primary, general, special, or runoff election for the office of -

(A) President of Vice President:

(B) Senator, or

(C) Representative in, or Delegate or Resident Commissioner to, the Congress: and

(2) the term "State" means a State of the United States, the district of Columbia, the Commonwealth of Puerto Rico, and any other territory or possession of the United States.